No. 82-6645

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

BUSTER FRANKLIN MERRELL, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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Petitioner replies as follows to the Memorandum of the United States in Opposition (hereinafter Government's Memorandum):

1. The Government's Memorandum on Page 2 states: "The court, [Sixth Circuit] moreover, distinguished Boss on its facts (Id at 4-5)."

In fact, the court stated: "The major flaw in appellant's argument is that the strict necessity test has only been adopted by the Boss court . . . Since the Boss case ruled to the contrary, we decline to follow it." Id at 4.

Thus the decision of the court of appeals does conflict with Boss, and does warrant further review.

2. The Government's Memorandum on Page 2, footnote two, states that a co-defendant confirmed that Petitioner served coffee and acted as a janitor, and "testified that petitioner 'possibly' acted as a dealer as well (TR. 496-492)." The Government's Memorandum repeats this latter claim again on Page 4 in footnote four.

In fact there was no evidence at trial that Petitioner ever acted as a dealer. "The "possibly" testimony cited by the Government was the only testimony in the trial that alluded to the possibility that Petitioner had engaged in a gambling function. The testimony was as follows:

Q When the three dealers -- I am talking about Mr. Raymond, Mr. Haifi, Jimmy Salem, when they weren't there, who acted as dealer?

A (Gebara) Pardon me?

Q Who acted as dealer if these three individuals that night as dealer were not there?

A They were always there. Two of them always there, one or two of them. Lots of times they dealt the game with one dealer.

Q One dealer?

A Only used two dealers when the game got real busy.

Q Did Mr. Merrell act as dealer?

A I never saw him or I can't recall seeing him. I can't recall seeing him. It's possible, if you say he did.

Q I am not saying he did, sir. I am asking you.

A I don't recall.

A Could he have acted as dealer when you were there, yes or no?

A Possibly. (TR. 491-492)

This "possibly" testimony was ignored both by the trial judge in his findings of fact and by the court of appeals in its opinion. Thus neither footnotes two and four of the Government's Memorandum nor the testimony referred to are worthy of consideration with regard to the instant petition.

3. The Government's Memorandum on Page 3, footnote 3, states that the "Court has recently denied certiorari in two cases in which petitioners alleged a conflict with Boss. Jones v. United States, No. 82-1262, cert. denied (April 25, 1983); Rossano v. United States, No. 82-124, cert. denied (October 13, 1982)."

In fact, neither case involved facts akin to Boss and the instant case.

In Jones, the issue was whether an individual who personally owned 40% of the gambling operation (with his wife's interested added, they owned more than 50%) "conducted" the enterprise. (Facts supplied by Frank Haddad, Esq., attorney for Petitioner Jones, phone conversation, June 13, 1983).

In Rossano, where only the two major operators were presented, the issue was whether five or more individuals had "conducted" the gambling operation. Additional persons labelled by the Government as "conducting" were doormen, persons who paid protection money to police, a cook and a janitor. (Facts supplied by Carmine Nasuti, Esq., attorney for Petitioner Rossano, phone conversation, June 13, 1983). However, because the operators, doormen and persons paying protection money added up to more than five persons, the issue of whether a cook or janitor "conducts" a gambling operation was not clearly before the Supreme Court.

Thus, in neither Jones nor Rossano was there a direct conflict with Boss. In the instant case there is a direct conflict with Boss: Waiter/janitor included as one who "conducts" in the instant case; waitress not included in Boss.

4. The Government's Memorandum on page 3 misstates the holding in Boss in an attempt to support its argument that factual distinctions support the conflicting decisions. In fact, the

distinction between the duties of the waitress in Boss and Petitioner in the instant case does not eliminate the direct conflict between the two decisions.

The Government asserts that the court in Boss concluded that because the waitresses' "primary function was to serve drinks to the 200 to 400 patrons of a large dance hall and whose sole connection with the gambling business was serving drinks to the 25 to 30 dice players in a small adjoining 'gambling room'", that "the waitresses' relationship to the illegal gambling was 'too attenuated for them to be counted . . . as persons who conduct . . . the gambling business' under Section 1955 (671 F.2d at 402)."

In fact, the Court in Boss rested its decision that the waitresses did not conduct a gambling business on the fact that they did not perform functions "necessary to the illegal gambling business" such as making change for the gamblers, acting as security guards or guarding the door:

> Thus the Government's evidence here established only that the waitresses served drinks to the larger group in the dance hall and also to a smaller group in the dice room in the back. No showing was made that they served any other functions such as making change for gamblers in a cash game, acting as security guards, identifying customers while tending the door to a gambling room, or the like. There was no proof that they performed functions necessary to the illegal gambling business, and their relationship to it was too attenuated for them to be counted under the federal criminal statute as persons who "conduct, finance, manage, supervise, direct, or own" the gambling business. Id. at 402.

5. The Government's Memorandum on page 4 seeks to distinguish Boss on the ground that because Petitioner's services were only for the gambling operation, he cannot reasonably claim

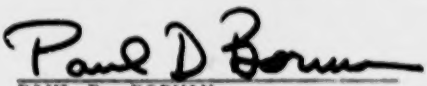
that he unknowingly or unwittingly facillitated gambling.

In fact, the Court in Boss did not assert that the waitress unknowingly or unwittingly facillitated the dice game. In both cases, it was evident that the waitresses/waiter, in providing their services to the dice games, knew that an illegal gambling operation was taking place.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

FEDERAL DEFENDER OFFICE



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Dated: June 14, 1983

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CERTIFICATE OF SERVICE

Paul D. BORMAN, in compliance with Supreme Court Rule 28.4(a) and 28.5(b) does hereby certify that he is a member of the Bar of the Supreme Court and that on the 14th day of June, 1983, did deposit in the United States mail, with postage fully prepaid, one (1) copy of the Petitioner's Reply to Memorandum for the United States in Opposition, addressed to the Solicitor General, Department of Justice, Washington, DC, 20530.

Paul D Borman

PAUL D. BORMAN